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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

AT&T Wireless Services, Inc. ("AT&T"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby submits its opposition to the petitions for reconsideration of the Commission's Order[1/] filed by the American Petroleum Institute ("API"), the Association of American Railroads ("AAR"), the Association of Public-Safety Communications Officials-International, Inc. ("APCO"), Small Business in Telecommunications ("SBT"), Tenneco Energy ("Tenneco"), and UTC, The Telecommunications Association ("UTC") (collectively "Incumbent Petitions" or "Incumbent Petitioners").[2/] These parties represent microwave licensees and all propose modifications to the Commission's rules that would result in further delays in relocating incumbents and commencing PCS operations in the 2 GHz band.

[1/] Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 95-157, RM-8643 (released April 30, 1996) ("Order").

[2/] Petition for Reconsideration of American Petroleum Institute (July 12, 1996); Petition for Partial Clarification and Reconsideration of the Association of American Railroads (July 12, 1996); Petition for Partial Reconsideration of the Association of Public-Safety Communications Officials-International, Inc. (July 12, 1996); Petition for Reconsideration of Small Business in Telecommunications (May 28, 1996); Petition for Clarification and Partial Reconsideration of Tenneco Energy (July 12, 1996); Petition for Reconsideration/Clarification of UTC, the Telecommunications Association (July 12, 1996).

Because the Order more than adequately preserves the rights of microwave licensees, the Commission should deny the Incumbent Petitions. Instead, the Commission should grant the petition filed by AT&T, four other PCS licensees, and the Cellular Telephone Industry Association (collectively, the "PCS Licensees"), which proposes that microwave incumbents be required either to vacate their 2 GHz frequencies by the end of the mandatory negotiation period or automatically convert their licenses to secondary status at that time.[3/] In addition, the Commission should adopt the proposals of Omnipoint Communications, Inc. to deem requests by incumbents for cash windfalls during the mandatory period bad faith negotiation and to clarify that the costs of relocating microwave links outside the licensed PCS band are "premiums."[4/] Such rule revisions and clarifications will encourage meaningful negotiation between the parties and promote more rapid PCS deployment.

I. The Time Periods for Relocation and Reimbursement Should be Shortened, Not Lengthened

Pursuant to Section 101.79(a), 2 GHz microwave incumbents may retain their primary status until an emerging technology licensee requires use of the spectrum but the new licensee will not be required to pay for relocation after April 4, 2005.[5/] The Incumbent Petitioners argue that the Commission should abolish this sunset provision and allow the payment obligation to continue indefinitely. AAR, for example, states that "[w]hether a

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[3/] Petition for Reconsideration or, in the Alternative, for Rulemaking of AT&T Wireless Services, Inc., GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation, and the Cellular Telecommunications Industry Association (July 12, 1996) ("PCS Licensees Petition").

[4/] Petition of Omnipoint Communications, Inc. for Reconsideration and Clarification at 1, 4-7 (July 12, 1996).

[5/] 47 C.F.R. § 101.79(a).

forced relocation occurs after one, fifteen, or twenty years, a PCS licensee who benefits from the relocation should be required to pay for the relocation."[6/]

In the Order, the Commission recognized that setting a sunset date "provides certainty to the process and prevents the emerging technology licensee from being required to pay for relocation expenses indefinitely."[7/] Under the Incumbent Petitioners' proposal, by contrast, microwave licensees would have little incentive to move voluntarily and PCS licensees would be unable to budget their own system implementation adequately. Sunsetting the payment obligation while allowing microwave incumbents to continue to operate in the 2 GHz band until their spectrum is needed provides necessary closure for all parties.

The Incumbent Petitioners' contentions that the ten-year period established by the Commission is inadequate are unpersuasive. As the Commission observed, most of the equipment used by incumbents will be fully amortized or in need of replacement by 2005. Several of the Incumbent Petitioners confirm that the analog equipment currently used by most 2 GHz licensees is outdated and finding replacement parts is becoming difficult. Indeed, these parties have argued during the course of this proceeding that the Commission should require PCS licensees to fund upgrades to digital facilities because digital equipment is the standard in the industry and the use of outmoded equipment might compromise the public safety.[8/] APCO asserted that most incumbents have plans to replace their analog

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[6/] AAR Petition at 12.

[7/] Order at ¶ 66.

[8/] See, e.g., Comments of the American Petroleum Institute at 17; Comments of the Association of Public-Safety Communications Officials-International, Inc. at 6; Comments of the Association of American Railroads at 6.

systems with digital facilities once the useful life of the current equipment has expired.[9/] These statements call into question the verity of the Incumbent Petitioners' current and unsupported assertions that "the remaining useful life of microwave equipment now owned by incumbents may well exceed the period ending in April, 2005"[10/] and that "the Commission's assumption regarding equipment amortization is unsound."[11/] Moreover, the claim that the sunset rule will place an unfair economic burden on incumbents "who have recently replaced or upgraded their equipment"[12/] is wholly undermined by the fact that microwave incumbents have been on notice since 1992 of the Commission's intention to reallocate 2 GHz spectrum to emerging technologies services.[13/] The ten-year sunset rule furthers the public interest and should be retained intact.

The Commission should also reject AAR's request to raise from five to ten years the limit on a PCS licensee's responsibility for increased recurring costs. AAR's contention that relocated microwave incumbents will face substantial recurring costs after five years is wholly speculative. In addition, as the Commission noted, many incumbents would have been required to bear some of these costs themselves had they not been relocated.

[9/] See Order at ¶ 67 (citing APCO Comments at 6-7).

[10/] Tenneco Petition at 10.

[11/] AAR Petition at 12.

[12/] AAR Comments at 12.

[13/] Order at ¶ 66 (citing Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992)).

The Commission should not entertain these attempts by microwave incumbents to use relocation as a justification to shift all microwave upgrade and operating expenses to PCS licensees for the foreseeable future. Instead, the Commission should adopt on reconsideration the PCS Licensees' proposal to require microwave incumbents to complete the relocation process and vacate the 2 GHz frequencies by the end of the mandatory period.[14/] In the alternative, the Commission should automatically convert incumbent microwave licenses to secondary status immediately upon expiration of the mandatory negotiation period.[15/] This action would encourage incumbents to relocate during the periods established for this purpose and would provide PCS licensees with a date certain on which they will be able to deploy their systems in order to satisfy the Commission's aggressive build-out rules.[16/]

II. PCS Licensees Should Only Be Required to Pay for Comparable Microwave Facilities

In the Order, the Commission reiterated that comparability means that a system must be equal or superior to the existing system. Thus, PCS licensees are not required to pay for

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[14/] See PCS Licensees Petition.

[15/] Id.

[16/] Order at ¶¶ 24, 28, 30, 33. AT&T supports the request of the Personal Communications Industry Association to extend from ten to twenty business days the time period in which a PCS licensee must submit documentation of a relocation agreement to the clearinghouse. See The Personal Communications Industry Association Petition for Partial Reconsideration (July 12, 1996). Adoption of this proposal would not impose a hardship on any party and would more accurately reflect the complexity associated with translating relocation agreements into the necessary standard documentation.

upgrades to digital facilities or otherwise provide microwave licensees with greater communications throughput or reliability.[17/]

The Incumbent Petitioners argue that the Commission should determine throughput comparability by reference to the total capacity of the system, rather than actual use. As the Commission stated, the public interest would not be served by automatically holding in reserve spectrum that may be needed for future use.[18/] Rather, limiting spectrum to demonstrated current needs will promote spectrum efficiency, as well as the development and use of technology that will increase capacity without increasing bandwidth. In an era when all spectrum users are developing innovative ways to make do with less, it would make no sense to provide microwave licensees with the incentive to maintain the status quo.[19/] In this regard, the Commission should also affirm its determination that overall system reliability, as opposed to radio link reliability, will be the measure of whether a replacement system is

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[17/] The Commission should not adopt API's suggestion that the rule establishing a 12-month trial period during which incumbents can ensure their facilities are comparable be made retroactive to apply to existing voluntary contracts. API Petition at 9-10. Microwave incumbents were on notice that a number of PCS licensees had requested clarification of the question of whether the rule would cover voluntary agreements and they entered into contracts with this knowledge.

[18/] Order at ¶ 29.

[19/] UTC proposes that PCS licensees should be required to provide an incumbent with a replacement system that has equal or superior capacity if the incumbent can demonstrate a need for this capacity based on past growth, anticipated core business applications, or other factors. UTC Petition at 4. This proposal would create great uncertainty in the negotiation process and would require the Commission to arbitrate countless fact-based disputes regarding microwave licensees' statements of projected needs. Moreover, it would undermine the Commission's goal of promoting spectrum efficiency.

comparably reliable.[20/] Reducing the reliability measurement to component parts of the microwave system is unnecessarily burdensome.

III. The Commission Should Reject Microwave Incumbents' Requests for Additional Payments

The Commission's amended rules more than adequately provide for the payments necessary to keep microwave incumbents whole. Therefore, the Commission should not abolish the two percent cap on transactions costs, as suggested by several Incumbent Petitioners. AT&T believes that the Commission should have adopted its proposal to exclude extraneous fees altogether because such payments reward incumbents that view the relocation process as a profit-making business.[21/] In lieu of elimination of this requirement, however, the two-percent cap at least encourages the incurrence of only prudent and legitimate expenses.

Likewise, the Commission should sustain its determination that PCS licensees will not be required to cover transactions costs incurred during the voluntary and mandatory period once involuntary relocation has commenced.[22/] Knowing that they may not be able to recover such expenses if they delay negotiations might be the only provision in the Commission's rules that gives microwave licensees an incentive to relocate voluntarily.

Finally, the Commission should deny SBT's proposal to extend the extraneous payment obligation to internal resources devoted to the relocation process.[23/] The

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[20/] Order at ¶ 30.

[21/] Id at ¶¶ 41-42.

[22/] Id. at ¶ 43.

[23/] SBT Petition at 5-6.

Commission properly concluded that such expenses, which likely will be outweighed by the other benefits of relocation, would be difficult to determine and too hard for a PCS licensee to verify.[24/] Moreover, SBT's assertion that, through the use of internal resources, microwave incumbents are "work[ing] for the benefit of the PCS licensee" is misguided.[25/] The Commission's determination that PCS licensees need not cover a microwave incumbent's decision to devote internal resources to the relocation process cannot reasonably be construed as a taking under the Fifth Amendment.

[24/] Order at ¶ 42.

[25/] SBT Petition at 6.

CONCLUSION

For the foregoing reasons, the Incumbent Petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that on this 8th day of August, 1996, I caused a copy of the foregoing Opposition to Petitions for Reconsideration to be sent by first class mail, postage prepaid, or to be delivered by messenger (*) to the following:

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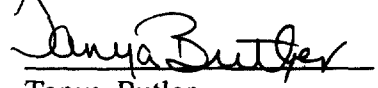

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